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IN THE

Supreme Court of the United States

October Term, 1952

No. 604

HARRY H. DRILL, *Petitioner*

v.

UNITED STATES, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court of Claims

REPLY OF PETITIONER TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

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No. 696

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Argument

First, and for his reply to the brief of the United States opposing a review of this case, Petitioner respectfully reminds that the only issue before this Court for determination on this proceeding is whether or not Certiorari should issue.

By Rule of this Court, Petitioner is not permitted to argue the "merits" of his causes of action but must await

issuance of the Writ of Certiorari before he may submit a brief on the "merits". However, the United States is free to choose upon this proceeding to (1) argue the "merits" of its defenses; (2) to ignore the Record; (3) to misrepresent the Record; (4) to advance irrelevant or specious theories of law; or (5) to cite authorities applicable to different factual situations than those shown in this Record; and the United States has done so in its "opposition brief" in that exact order and sequence.

Nevertheless, reason for review of this case appears because it presents the issue of "Which came first, 'the chicken' or 'the egg'?" That is, did the Court of Claims *take jurisdiction* of the claims and subject matter *before* it ruled on the "merits"; or did it rule on the "merits" *without* taking jurisdiction at all; or did it repudiate its jurisdiction *after* deciding matters of law and "merits"?

The "opposition brief" of the United States *admits* and *concedes* that the Record discloses that "the egg" came first; hence the Court need not resort to the Record to confirm that the Court of Claims rejected necessity for "the chicken". To illustrate and to explain, viz: Let the taking of jurisdiction by the Court of Claims over the subject matter of Petitioner's claims and causes of action represent "the chicken"; let its decision that those claims and causes of action are not justiciable and not proper represent "the egg" If "the chicken" came first, then the Court had authority to produce an "egg" either "good" or "bad". But, if "the egg" came first, it had no "chicken" to hatch it to see whether it would be "good" or "bad", so it remained merely an "egg" without meaning or validity. That is to say, of course, that if the Court of Claims *failed to take jurisdiction* over the subject matter of these claims, its judgment that the causes of action and claims are not justiciable and not proper is void. On the other hand,

if the Court *did take and retain jurisdiction*, it had a right to rule on the merits of those causes of action *AFTER* taking jurisdiction, and the correctness of the ruling would be the only remaining issue, *unless the Court thereafter repudiated its jurisdiction* ver the "subject matters".

This Supreme Court has ruled decisively that "the egg" *cannot or must* not "come first", *Bell v. Hood*, 327 U.S. 678; 66 S. Ct. 773, (Pet. 17; 21-22).

Although having admitted and conceded in its "opposition brief" (1) that the Court *did not take jurisdiction* and (2) that the Court *did rule* that the claims and causes of action are not justiciable and not proper, thus making decision on the "merits", the United States proceeded to advance specious arguments *why* the Court so ruled without taking jurisdiction. The Record, of course, substantiates the Government's *admissions*, but there is nothing in this Record to either justify or substantiate the "arguments" of the United States since the facts and circumstances and settled law as to Petitioner's claims, shown in this Record, are wholly different and easily distinguishable from the facts merely hypothesized by the United States in its "arguments". Specifically, the Record (R. 188-192) discloses that the United States objected and protested that the Court "lacked jurisdiction of the subject matter" *for the reason* that Petitioner sought a "Declaratory Judgment", and, in that sense, had not claimed a right nor its violation but instead asked the Court of Claims to determine for him whether or not he had any rights and to identify them. Further, the United States argued (R. 192) that Petitioner "failed to state a claim *within the jurisdiction of the Court*". Thereupon, the Court concurred with Respondent's "views" and arguments that no claim was stated within the Court's juris-

diction, and being misled thereby, additionally expressed "conclusion" and ruled "that Plaintiff *has failed to state a proper cause of action*" (Pet. App. 9a). Therefore, that being the factual situation presented in this Record, the United States renews its "argument", (Opp. brf. p. 6), that "a litigant must establish that his cause of action is one that entitles him to monetary relief" within the jurisdiction of the Court. Summarizing, the United States repeats its former argument that the Court of Claims *must dismiss* and *admits that the Court did dismiss* Petitioner's claims because "it lacked jurisdiction of the subject matter" for the reason that a failure to state a proper cause of action or justiciable claim is a JURISDICTIONAL DEFECT.

This Petitioner protests such decision and its illegal basis for the reason that it is contrary to "applicable decision" of this Court in *Bell v. Hood*, supra, wherein this Court ruled specifically and decisively on the point that "the chicken" *must come before* "the egg". In *Bell v. Hood*, supra, this Court stated, viz: *"it is well settled that failure to state a proper cause of action calls for a decision on the merits and not for dismissal for want of jurisdiction" and that "whether the Complaint states a cause of action is a question of law and just as issues of fact must be decided* AFTER *and not* BEFORE *the Court has assumed jurisdiction over the controversy*". The United States offers no decision by this Court reversing or modifying this Court's decision made in 1946 in the case of *Bell v. Hood*, supra. Neither does the United States urge that Petitioner's claims and causes of action existed as *common law rights* against the Sovereign United States nor that the United States has withdrawn its consent to be sued on causes of action alleged to be "founded" as Petitioner has alleged his claims to be "founded". Nevertheless, it is clear that the United

States insists that the Court of Claims, BEFORE *taking jurisdiction of the subject matter*, may appraise and judge the "merits" of the claims *as to both law and fact alleged in a verified Complaint* which has *not* been controverted by affidavit of the United States; and that still *without taking jurisdiction*, the Court can lawfully rule that such claims are without "merit" in law or in fact; or that the Court may "temporarily" take jurisdiction over the subject matter for the purpose of determining the justiciability of the claims as to law and fact, and then AFTERWARDS rule that *all* or *some* of the subject matter of those claims is "beyond its jurisdiction" without necessity to identify *which subject matters present* JURISDICTIONAL DEFECT and *which claims* are without "merit" in law or fact, and then repudiate even such "temporary" jurisdiction!

Therefore, the "conclusions" expressed by the Court of Claims, (Pet. App. 9a), *when tested* by this Court's ruling in *Bell v. Hood*, supra, establish either (a) that the Court of Claims decided matters of law and "merit" BEFORE *and without taking jurisdiction*, or (b) *repudiated* its jurisdiction AFTER it decided the "merits" of the claims and thereby destroying *all basis for any decision* on the justiciability and merits of the claims.

Secondly, the United States concedes that Petitioner is both an attorney and a former Government employee but urges this Court to believe that one with that background would speciously presume, theorize, and go so far as to allege before a Court of law that a cause of action might be "founded" upon a mere refusal of the Government to "act favorably" upon an application for employment wherein a discretionary right exists in the Government to "act favorably" or to "act unfavorably". Here, the United States chooses to ignore the Record (R. 33-34; 38;

45-48; 50-53; 56; 65-67) wherein Petitioner has alleged in his verified Petition that the United States does *not have* a "discretionary" right to commit any of the acts complained of in this Record. In particular, Petitioner urges (Pet. App. 18a, footnote 3, and footnote 3 at 20a-21a) that the United States has *pretended* to have a "discretionary right" to determine that he is *not* a "Preference Eligible" and to deny his requests for the rights and benefits provided for him by Act of Congress in the Veterans' Preference Act of 1944, as amended. Further, Petitioner's application for Certiorari and the Record disclose Petitioner's complaints that the United States exercised such pretended and non-existent discretion arbitrarily and capriciously and without a hearing of any kind, contrary to the "Due Process" clause of the 5th Amendment. Therefore, the Government's inferences to this Court that it has a "discretionary right" to act favorably or unfavorably to comply with an Act of Congress and/or the regulations enacted to enforce compliance therewith must raise a feeling of foreboding for continuous injury to all citizens who expect the Executive Branch to comply with mandates of the Congress and its own executive department regulations. Thus, the United States furnishes additional reason why the case at bar is far beyond the "episodic" in importance and consequence. Indeed, the Government's citation and quotation of provisions of the Veterans' Preference Act (Opp. brf. 2-4) does not carry assurance that it has complied with its provisions and has not violated the primary rights of this Petitioner alleged to be "founded" thereon.

Thirdly, it is significant that neither the United States nor the Court of Claims has made any suggestion that Petitioner's claims were actionable or prosecutable as *common law rights*. Therefore, it seems to be conceded, and it *must be conceded*, that Petitioner had no right *at common law* to be *preferred* by his Sovereign for public em-

ployment or reemployment. Neither does Petitioner have a *common law right* to a cause of action for illegal debarment and proscription from public employment or even the right to compete with others when the Sovereign chooses to debar, or proscribe, or deny its employment. Hence, Petitioner's allegations, not denied by the United States, that his claims and causes of action are "founded" as specified in 28 USCA Sec. 1491, must be accepted to be true until such time as the United States chooses to "argue" that a cause of action for illegal denial of public employment by the Sovereign existed at common law and was prosecutable in the Courts of Westminster. This Record (R. 1-184) reveals that Petitioner claimed his primary rights and their invasion to be "founded" "four-fold" or "four times over" within and as specified in 28 U.S.C.A. Sec. 1491, the "Tucker Act". Therefore, even if the Court of Claims *had taken* jurisdiction over these claims and/or *had not* repudiated its jurisdiction over the subject matter, there is nothing in this Record that could possibly justify a ruling on the "merits" that the claims are defective for lack of justiciability for the reason that they existed as "common law" rights and causes. It is for such reason that the cases cited by the United States (Opp. brf. p. 7) are wholly irrelevant and immaterial to the case at bar. On the contrary, this Petitioner's right to prosecute his proper and justiciable claims in the Court of Claims is authorized and sustained by the Supreme Court's ruling in *Dooley* v. *United States*, 182 U.S. 222; 21 S. Ct. 762. This Court ruled in the Dooley case, supra, that "the first class of cases specified in the Tucker Act have been repeatedly sustained to be within the jurisdiction of the Court of Claims", and this Court further opined that it made no difference whether the complained acts were tortious or not if those complained acts were "founded" as required in the first class of cases in the Tucker Act.

Therefore, Petitioner respectfully submits that if his claims and causes of action and their violation by the United States as disclosed in this Record have been rejected by the Court of Claims on jurisdictional grounds, then such decision repudiates this Court's decision in the Dooley case, supra. Moreover, such ground for repudiation by the Court likewise repudiates the Court of Claims own decisions in *Simmons v. United States*, 113 C.Cl. 182 (1949); *Eversharp* v. *United States*, 129 C.Cl. 772; *Blackmar* v. *United States*, 120 F. Supp. 408 (1954); and a long line of decisions. See also *Carisso* v. *United States* 106 Fed. 2nd 709 (1939).

Fourthly, the opposition brief of the United States urges the beliefs of its Executive Branch that neither the rights and immunities provided in the Constitution nor its self-imposed executive regulations nor the Veterans' Preference Act afford remedial relief other than possible injunctive relief through "cease and desist" orders but without monetary damages after Petitioner has sustained damage. Such arguments and inferences supply additional support to Petitioner's contentions that the case at bar is far beyond the episodic and portend repetition of the same violations of the rights of countless other citizens and veterans that have been sustained by this Petitioner. Therefore, review on Certiorari in this case is additionally warranted and for the same reasons that this Court issued Certiorari in *Elder* v. *Brannan*, Secy of Agriculture, 71 S. Ct. 685 (1950), saying, *"We granted Certiorari because of the obvious impact of these cases on federal employment policies"*.

Finally, and summarizing, it is urged (1) that if the Court of Claims failed to take jurisdiction over the subject matter of these claims but nevertheless decided issues of law and merit, it rejected this Court's "applicable decision" in *Bell v. Hood*, supra. On the other hand, (2), if the

Court of Claims decided it was *without jurisdiction* for the reason that the claims and causes of action are not justiciable and not proper within its jurisdiction, it rejected this Court's "applicable decision" in *Dooley* v. *United States,* supra. And (3), if *it did take jurisdiction,* and if it then ruled that the causes of action and claims are not justiciable for monetary relief, it nevertheless still rejected this Court's "applicable decision" in *Dooley* v. *United States*, supra, and has ruled contrary to the Dooley case.

Conclusion

It is respectfully submitted that the reasons and authorities presented in the Petition for Writ of Certiorari *are* (1) *supported* by the admissions, concepts of law, and arguments expressed in the opposition brief of the United States; and (2) further supported by the responsive material and authorities presented in this reply to such opposition brief; and (3) present good and sufficient reason for the issuance of the Writ and review herein and in order that the ruling of the Court of Claims in this case may not be followed as a precedent.

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January 1963.